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FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

SEP 29 1 30 PM '04

DISPATCH

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
FM Table of Allotments,)	
FM Broadcast Stations.)	
(Louisburg and Hillsborough, North Carolina)	)	MB Docket No. 04-375
	)	RM-11038
)	
(Hutchinson and Haven, Kansas)	)	MB Docket No. 04-376
	)	RM-11039
)	
(Dover and North Canton, Ohio)	)	MB Docket No. <u>04-377</u>
	)	RM-11077
)	
(Lake Charles, Louisiana and West Orange,	)	MB Docket No. 04-378
Texas)	)	RM-11079
)	
(Eatonton and Lexington, Georgia)	)	MB Docket No. 04-379
	)	RM-11086

NOTICE OF PROPOSED RULEMAKING**Adopted: September 23, 2004****Released: September 27, 2004****Comments Date: November 18, 2004****Reply Comment Date: December 3, 2004**

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a multiple docket *Notice of Proposed Rule Making* setting forth five separate proposals to amend the FM Table of Allotments, Section 73.202(b) of the Rules. Each proposal involves a change of community of license. Each petitioner states that it will file an application for construction permit to effectuate the change of community if granted. We believe that each proposal warrants consideration because it complies with our technical requirements and would serve the public interest.

2. Each of the petitioners filed its proposal for reallotment in accordance with the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license while not affording other interested parties the opportunity to file competing expressions of interest in the proposed allotment.¹ In each case, the amended allotment would be mutually exclusive with the station's present allotment. In considering a reallotment proposal, we

¹ See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

compare the existing allotment to the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based upon the *FM Allotment Priorities*.²

3. This is a multiple docket *Notice of Proposed Rule Making* issued in response to a Commission *Public Notice* released October 2, 1998 (DA 98-1987). We are combining five separate FM allotment proposals into a single *Notice of Proposed Rule Making*. Each proposal has its own docket and rulemaking number and the Commission's Reference Center will maintain a separate file for each docket. As discussed in the *Public Notice*, this procedure will conserve Commission resources and expedite the processing of FM allotment petitions by avoiding duplicative actions. We seek comments on the following proposals:

A. MB Docket No. 04-375; RM-11038

Petitioner: New Century Media Group, LLC

c/o David Kushner, Esq.
Brooks, Pierce, McClendon, Humphrey
& Leonard, L.L.P.
First Union Capitol Center, Suite 1600
150 Fayetteville Street Mall
Raleigh, North Carolina 27602

Proposal: New Century Media Group, LLC, proposes the reallocation of Channel 273A from Louisburg to Hillsborough, North Carolina, and the modification of Station WHLQ(FM)'s license accordingly.³

<u>Community</u>	<u>Present</u>	<u>Channel No.</u>	<u>Proposed</u>
Louisburg, North Carolina	273A		---
Hillsborough, North Carolina	---		273A

Coordinates: The reference coordinates for Channel 273A at Hillsborough are 36-06-49 NL and 79-00-20 WL. This allotment requires a site restriction of 9.51 kilometers (5.91 mile) northeast to avoid a short-spacing to the licensed site of Station WJMH(FM), Channel 271C, Reidsville, North Carolina, and to Station WIOZ-FM, Channel 273A, Southern Pines, North Carolina.

Additional Information: The reallocation of Channel 273A to Hillsborough, North Carolina, will provide the community with its first local aural transmission service, without depriving Louisburg of its sole local service. Station WYRN(AM) (1480 kHz) will remain licensed to the community. An engineering analysis has determined that Hillsborough is located within the Durham Urbanized Area, and

² The FM Allotment priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; (4) Other public interest matters. [Co-equal weight is given to priorities (2) and (3)]. See *Revision of FM Assignment Policies and Procedures*, 90 FCC2d 88 (1982).

³ In support of its proposal, Petitioner states that Hillsborough is a Census Designated Place with a 2000 U.S. Census population of 5,446 persons. It is the county seat of Orange County (population 118,227). It contains the county's government offices and the county courthouse. Hillsborough has no broadcast stations licensed to it, making it the largest county seat in North Carolina without a radio station. During the 1990's, Hillsborough grew by nearly 28%. Hillsborough is governed by a mayor and town council, together with a town manager. The town provides water and sewer service to its residents and operates police and fire departments.

the proposed 70 dBu signal encompasses 39.5% of that Urbanized Area. Since the community is located within the Durham Urbanized Area, petitioner has provided the required *Tuck* analysis.⁴ Petitioner seeks to change its transmitter site and must provide the required gain and loss area data.

FCC Contact: Sharon P. McDonald, Media Bureau, 202-418-2180.

B. MB No. 04-376; RM-11039

Petitioner: Ad Astra per Aspera Broadcasting, Inc.

c/o Joseph P. Benkert, Esq., P.C.
P.O. Box 620308
Littleton, Colorado 80162-0308

Proposal: Ad Astra per Aspera Broadcasting, Inc., proposes the reallocation of Channel 246C2 from Hutchinson to Haven, Kansas, and the modification of Station KSKU(FM)'s construction permit accordingly.⁵

<u>Community</u>	<u>Present</u>	<u>Channel No.</u>	<u>Proposed</u>
Hutchinson, Kansas	240A, 246C2, 271C, 275C		240A, 271C, 275C
Haven, Kansas	---		246C2

Coordinates: The reference coordinates for Channel 246C2 at Haven are 37-47-47 NL and 97-31-59 WL. This allotment requires a site restriction of 24.9 kilometers (15.5 miles) southeast to avoid a short-spacing the proposed site for Channel 247C3, Howard, Kansas.

Additional Information: The reallocation of Channel 246C at Haven, Kansas, will provide the community with its first local aural transmission service, without depriving Hutchinson of its sole local service. Stations KWBW(AM), KHCC-FM, KZSN(FM) and KHUT(FM) will remain licensed to the community. Since the proposed 70 dBu signal encompasses 86.1% of the Wichita, Kansas Urbanized Area, Petitioner has provided the required *Tuck* analysis.⁶ Petitioner seeks to change its transmitter site and must provide the required gain and loss area data.

FCC Contact: Sharon P. McDonald, Media Bureau, 202-418-2180.

⁴ *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995); *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951) *RKO General, Inc. (KFRC) ("KFRC")*, 5 FCC Rcd 3222 (1990), and *Faye and Richard Tuck ("Tuck")*, 3 FCC Rcd 5374 (1988).

⁵ In support of its proposal, Petitioner states that Haven is located in Reno County and has a 2000 U.S. Census population of 1,175 persons. Haven has its own city government, with a city council, mayor and city administrator. Haven has its own post office and zip code. It also has its own police and fire departments, as well as parks and recreation department. Haven has a grade school, middle school, high school and public library. Haven is the home to over 50 businesses. The city provides electricity, and water sewer and refuse disposal services to the residences and businesses.

⁶ See Footnote 4, *supra*.

C. MB Docket No. 04-377; RM- 11077**Petitioner:** Clear Channel Broadcasting Licenses, Inc.

c/o Mark N. Lipp, Esq.
 Vinson & Elkins, L.L.P.
 1455 Pennsylvania Ave., N.W., Suite 600
 Washington, D.C. 20004-1008

Proposal: Clear Channel Broadcasting Licenses, Inc., proposes the reallocation of Channel 269A from Dover to North Canton, Ohio, and the modification of Station WJER-FM's license accordingly.⁷

<u>Community</u>	<u>Present</u>	<u>Channel No.</u>	<u>Proposed</u>
Dover, Ohio	269A		---
North Canton, Ohio	--		269A

Coordinates: The reference coordinates for Channel 269A at North Canton are 40-48-30 NL and 81-23-31 WL. This allotment requires a site restriction of 7.5 kilometers (4.7 miles) south to avoid short-spacings to the licensed sites of Station WHOT-FM, Channel 266B, Youngstown, Ohio, and Station WDOK(FM), Channel 271B, Cleveland, Ohio. Since North Canton is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been requested.

Additional Information: The reallocation of Channel 269A to North Canton, Ohio, will provide the community with its first local aural transmission service, without depriving Dover of its sole local service. Station WJER(AM) will remain licensed to the community.⁸ Moreover, the reallocation will allow Station WJER-FM to increase its power from 3 to 6 kilowatts, and will eliminate the preexisting short-spacing with Station WNKO(FM), Channel 269A, Newark, Ohio. Since the proposed 70 dBU signal encompasses 100% of the Canton, Ohio Urbanized Area, petitioner has provided the required *Tuck* analysis.⁹ Petitioner seeks to change its transmitter site and has also provided the required gain and loss area data.

FCC Contact: Sharon P. McDonald, Media Bureau, 202-418-2180.

D. MB Docket No. 04-378; RM- 11079**Petitioner:** Apex Broadcasting, Inc.

c/o Mark N. Lipp, Esq.
 Vinson & Elkins, L.L.P.

⁷ In support of its proposal, Petitioner states that North Canton is incorporated and has a 2000 U.S. Census population of 16,369 persons. North Canton has a mayor and a city council composed of seven members. It has three zip codes (44799, 44720, 44709) and two U.S. Post Offices. North Canton also has police, fire and EMS departments, schools and library. Petitioner further states that North Canton is home to a variety of businesses and commercial establishments, with a number of the businesses using "North Canton" in their names.

⁸ Station WJER(AM) is operated pursuant to a "dual city" license, and is licensed to Dover and New Philadelphia, Ohio. Clear Channel is the licensee of WJER(AM) and currently provides local service to Dover and New Philadelphia.

⁹ See Footnote 4, *supra*.

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Suite 600
Washington, D.C. 20004-1008

Proposal: Apex Broadcasting, Inc. proposes the reallocation of Channel 258C0 from Lake Charles, Louisiana to West Orange, Texas, and the modification of Station KBXG(FM)'s construction permit accordingly.¹⁰

<u>Community</u>	<u>Present</u>	<u>Channel No.</u>	<u>Proposed</u>
Lake Charles, Louisiana	241C1, 258C0, 277C2		241C1, 277C2,
West Orange, Texas	---		258C0

Coordinates: The reference coordinates for Channel 258C0 at West Orange are 30-07-21 NL and 93-36-21 WL. This allotment requires a site restriction of 15.4 kilometers (9.5 miles) east to avoid a short-spacing to the licensed site of Station KSHN(FM), Channel 260C2, Liberty, Texas.

Additional Information: The reallocation of Channel 258C0 at West Orange, Texas, will provide the community with its first local aural transmission service, without depriving Lake Charles of its sole local service. Stations KYLC(FM), KOJO(FM), KYKZ(FM) and KBIU(FM) will remain licensed to the community. We note that Station KBXG(FM)'s current 70 dBu signal encompasses 100% of the Lake Charles, Louisiana Urbanized Area and will continue to do so at the proposed transmitter site. In addition, the proposed 70 dBu signal encompasses 100% of the Port Arthur, Texas Urbanized Area, and 92% of the Beaumont, Texas Urbanized Area. As a result, Petitioner has provided the required *Tuck* analysis.¹¹ Petitioner seeks to change its transmitter site and has also provided the required gain and loss area data.

FCC Contact: Sharon P. McDonald, Media Bureau, 202-418-2180.

E. MB Docket No. 04-379 ; RM-11086

Petitioner: Middle Georgia Communications, Inc.

c/o Lauren A. Colby, Esq.
10 E. Fourth Street
P.O. Box 113
Frederick, Maryland 21705-0113

Proposal: Middle Georgia Communications, Inc., proposes the substitution of Channel 249C2 for Channel 249C3, the reallocation of Channel 249C2 from Eatonton to Lexington, Georgia, and the modification of Station WMGZ(FM)'s license accordingly.¹²

¹⁰In support of the proposal, Petitioner states that West Orange is an incorporated community with a 2000 U.S. Census population of 4,111 persons. It has a mayor and five city council members. It has its own zip code (77630) and post office. West Orange has its own schools, and police and fire departments.

¹¹ See Footnote 4, *supra*.

¹² Petitioner originally filed a petition for rule making requesting the substitution of Channel 249C2 for Channel 249C3 at Eatonton, the reallocation of Channel 249C2 from Eatonton to Lincolnton, and the modification of Station WMGZ(FM)'s license accordingly. Petitioner subsequently filed a "supplement" to that petition requesting the

(continued....)

<u>Community</u>	<u>Present</u>	<u>Channel No.</u>	<u>Proposed</u>
Eatonton, Georgia	249C3		---
Lexington, Georgia	--		249C2

Coordinates: The reference coordinates for Channel 249C2 at Lexington are 33-45-03 NL and 82-48-53 WL. This allotment requires a site restriction of 30.5 kilometers (19.0 miles) southeast to avoid short-spacings to the licensed sites of Station WFOX(FM), Channel 246C, Gainesville, Georgia and Station WHZT(FM), Channel 251C, Seneca, South Carolina.

Additional Information: The reallocation of Channel 249C2 at Lexington, Georgia, will provide the community with its first local aural transmission service, without depriving Eatonton of its sole local service, whereas Station WKVQ(AM) (1520 KHz) will remain licensed to the community. Since the proposed 70 dBu signal is neither in nor near an Urbanized Area, a *Tuck* analysis is not necessary.¹³ However, since the petitioner seeks to change its transmitter site, the required gain and loss area data must be provided.

FCC Contact: Sharon P. McDonald, Media Bureau, 202-418-2180.

3. Comments, reply comments, counterproposals and other pleadings filed in response to this multiple docket *Notice of Proposed Rule Making* should reference *only* the specific docket to which the filing pertains. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached *Appendix* and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required in paragraph 2 of the *Appendix* before a channel will be allotted.

4. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, (47 C.F.R. §§ 1.415, 1.419) interested parties may file comments on or before November 18, 2004, and reply comments on or December 3, 2004, and are advised to read the *Appendix* for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW, TW-A325, Washington, D.C. 20554. Additionally, a copy of any filing should be served on the petitioner listed for the particular docket.

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to a rule making proceeding to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.¹⁴ This document does not contain [new or modified] information collection

(...continued from previous page)

reallocation of Channel 249C2 to Lexington instead of Lincolnton. However, since the Petitioner is no longer interested in the Lincolnton allotment, we will treat the "supplement" as a new petition for rule making.

In support of its proposal, Petitioner states that Lexington is an incorporated community with a 2000 U. S. Census population of 239 persons. It is the county seat of Oglethorpe County (12,635 persons). The city is governed by a mayor and five-person council. Lexington has its own post office and zip code (30648) Lexington provides city services which include city water, city trash pickup, and fire protection. There are also courthouse offices, a city hall, and sheriff's offices. Lexington is home to offices of the Board of Commissioners, Magistrate Judge, Tax Commissioner, Health Department, and Department of Family and Children Services.

¹³ See Footnote 4, *supra*.

¹⁴ See *Certification that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*. 46 FR 11549 (February 9, 1981).

requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* Section 3506(c)(4).¹⁵

6. Parties are required to file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

7. For further information concerning this proceeding, contact the FCC contact listed for that proceeding. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment, which has not been served on the petitioner, constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment that has not been served on the person(s) who filed the comment to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau

Attachment: Appendix

¹⁵ 44 U.S.C. § 3506(c)(4).

APPENDIX

1. Pursuant to authority found in Sections 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r), and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS PROPOSED TO AMEND the M Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this *Appendix* is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See 47 C.F.R. Section 1.420(d)).

(b) With respect to petitions for rule making which conflict with the proposals in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service (see 47 C.F.R. Section 1.420(a), (b) and (c)). Comments should be filed with the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of 47 C.F.R. Section 1.420, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Information Reference Center (Room CY-A257) at its headquarters, 445 12th Street, S.W., Washington, D.C. 20554.